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In The

Supreme Court of the United States

October Term, 1988

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE-TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Wyoming

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE SHOSHONE-BANNOCK TRIBES IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Wyoming Supreme Court correctly relied upon and applied "practicably irrigible acreage" as the governing federal law standard for quantifying irrigation or agricultural water rights reserved for the Wind River Indian Reservation in 1868 by the Second Bridger Treaty.

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Amicus curiae Shoshone-Bannock Tribes respectfully move this Court for leave to file *amicus curiae* brief. Pursuant to Rule 36.2, *amicus curiae* requested written consent from the parties. Because amicus curiae has received only one reply, which is filed with this brief, amicus curiae is filing this motion. Upon receipt of the other written consents, they will be forwarded to the Court.

The interests of *amicus* Shoshone-Bannock Tribes in this case are as follows:

1. The Shoshone-Bannock Tribes of the Fort Hall Reservation in Idaho have a direct interest in the outcome of this case. The Shoshone-Bannock Tribes comprise a single, federally-recognized Indian tribe with a governing body fully recognized by the United States. *See* 28 U.S.C. § 1362.

2. The Shoshone-Bannock Tribes are successors-in-interest to tribal signatories of the Fort Bridger Treaty of July 3, 1868 with the Eastern Band of Shoshone and Bannock Tribes, 15 Stat. 673. Pursuant to Articles 2 and 4 of the Fort Bridger Treaty, the Wind River Reservation in Wyoming and the Fort Hall Reservation in Idaho were established as permanent tribal homelands. *Amicus* has a vital and continuing interest in any interpretation or construction of the common Treaty.

3. This case involves water, the single most valuable and important resource vested in the Shoshone-Bannock Tribes. Fair quantification of water rights reserved by the Tribes for agricultural purposes within the boundaries of the Fort Hall Reservation is essential to tribal self-sufficiency and entirely consistent with the permanent homeland guarantee in the 1868 Treaty.

4. In 1987, a general stream adjudication of all rights to use waters of the Snake Riven Basin located in Idaho was commenced in an Idaho State Court. *Amicus* and Idaho have been engaged since 1985 in negotiations to quantify the reserved water rights claims of the Shoshone-Bannocks. Resolution of the instant case before the Court

will significantly impact the ability of *amicus* to advocate its interests and claims to water under the Fort Bridger Treaty in the on-going negotiations.

For the foregoing reasons, the Shoshone-Bannock Tribes hereby seek leave of the Court to file the attached *amicus curiae* brief.

DATED this 12th day of April, 1989.

Howard A. Funke
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Tribes

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BRIEF OF AMICUS CURIAE SHOSHONE-BANNOCK TRIBES

INTEREST OF AMICUS CURIAE

Amicus curiae Shoshone-Bannock Tribes (hereinafter sometimes "Tribes") have an especial, two-fold interest in this case.

First, disposition depends upon construction of the Fort Bridger Treaty of July 3, 1868, ratified on February 24, 1869, and proclaimed by President Ulysses S. Grant on February 26, 1869, 15 stat. 673 (hereinafter sometimes "1868 Treaty" or "Second Bridger Treaty"). By that solemn treaty, the United States pledged its honor to secure the Wind River Indian Reservation in Wyoming Territory and the Fort Hall Indian Reservation in Idaho Territory as permanent homelands for the respondent Shoshone Tribe (and after 1878 for the respondent Northern Arapaho Tribe) and for the Shoshone-Bannock Tribes, respectively. Decision on the privotal question of whether the practically irrigible acreage (PIA) standard is the correct test for measuring the agricultural water rights guaranteed by the 1868 Treaty could have a debilitating impact upon the scope of water rights reserved by the Shoshone-Bannock Tribes.

Second, Wyoming, joined by numerous western states, urges this Court to modify or abandon the PIA test as adopted in *Arizona v. California*, 373 U.S. 546 (1963) (*Arizona I*). The states seek remand to the Wyoming courts so that the latter might apply vague "balancing" or "tailoring" rules in determining the water needs and entitlements of the respondent tribes for agricultural purposes. Acceptance of that invitation by the Court will cast long shadows over on-going negotiations between the Shoshone-Bannock Tribes and the State of Idaho, which are

on the verge of quantifying the Tribes' federally-reserved 1868 Treaty water rights within the Snake River Basin.

SUMMARY OF ARGUMENT

The limited question before the Court is whether the Wyoming Supreme Court properly adopted and applied the PIA standard strongly endorsed in *Arizona I*. Wyoming and several *amici* states seek modification or abandonment of that settled and core principle for quantifying the irrigation water needs and entitlements of Indian reservations. As urged by the respondent tribes and the United States, this Court should decline to deviate from the well-established PIA standard and should affirm the decision of the Wyoming Supreme Court.

United States v. Shoshone Tribe, 304 U.S. 111 (1938), as well as numerous other decisions, clearly recognized that a gradual adoption of agrarian pursuits by signatories to the Second Bridger Treaty was one fundamental purpose mutually understood in 1868 to underlie creation of both reservations created thereby. These precedents also confirm that utilization of PIA as the measure of the tribal agricultural water rights accords with the language and spirit of the 1868 Treaty. The PIA principle is also fully consistent with material historical evidence bearing upon the probable, original congressional and tribal understandings of the 1868 Treaty.

The manner in which this Court disposes of the instant litigation will temper the good-faith, government-to-government negotiations on-going since 1985 between the Shoshone-Bannocks, the State of Idaho, the United States and a coalition of interested Idaho water users. Designated the Snake River Negotiations, these intergovernmental discussions were intended to quantify the Tribes' federally-reserved water rights throughout the Snake River Basin in Idaho.

These Snake River Negotiations have been substantially premised upon the continuing viability of the PIA principle. Utilization of this principle has enabled structured, reliable approaches for quantifying the Shoshone-Bannocks' on-Reservation agricultural water rights under the *Winters* Doctrine. Erosion or elimination now of the PIA rule will seriously disrupt and imbalance these negotiations, thereby likely leading to protracted and divisive litigation.

If this Court accepts the states' proposed battery of "balanced" or "narrowly tailored" or similarly ambiguous tests designed to just meet "minimal" tribal needs, the certainty and finality lying at the heart of the PIA standard will be wholly undermined. The Court's continuing adherence to, and deliberate deployment of, the analytical apparatus required by the PIA standard does not produce "windfalls" for Indian people. Moreover, it cannot reasonably be inferred that a settlement or vindication of the Indians' legitimate agricultural water rights derived from application of PIA will result in any squandering of these essential resources by tribes.

If PIA's settled methodology for determining the nature and extent of water rights reserved for Indians is replaced by highly inappropriate state-court discretion to define tribal "minimal needs," the intrinsic value of the federally guaranteed water rights of Indian reservations will be destroyed, thereby forever consigning reservation Indians to a permanent underclass status.

I. THE WYOMING SUPREME COURT CORRECTLY RELIED UPON AND APPLIED THE "PRACTICALLY IRRIGABLE ACREAGE" (PIA) STANDARD OF ARIZONA V. CALIFORNIA, 373 U.S. 546 (1963) (ARIZONA I) TO MEASURE THE EXTENT OF WATER RIGHTS NECESSARY TO FULFILL

THE AGRARIAN PURPOSES UNDERLYING CREATION OF THE WIND RIVER INDIAN RESERVATION BY THE SECOND BRIDGER TREATY.

The precise and only question before this Court is whether the Wyoming Supreme Court properly adopted and applied the PIA standard clearly articulated in *Arizona I*. Wyoming and the *amici* states invite this Court to adjust or abandon PIA in favor of an assortment of ambiguous "needs" tests deliberately designed to maximize the discretion of state courts in quantifying Indians' reserved water rights for agricultural purposes. Respondent and *amici* tribes, and the United States, urge that this Court decline to deviate from PIA and affirm the decision by the Wyoming Supreme Court on this point.

As amply demonstrated by briefs filed herein by the United States, the respondent tribes and other *amici* tribes, Wyoming's belated assault upon the PIA standard finds no reasonable support in the Court's pertinent precedents. These briefs also demonstrate the absence of any credible basis for accepting the states' thinly-veiled, optative attempt to effect an erosion—even elimination—of the Court's seminal decision in *Winters v. United States*, 207 U.S. 564 (1908) (*Winters*).[1]

The Shoshone-Bannock Tribes focus on the primary judicial rulings which confirm that a gradual transforma-

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[1] In *Winters*, 207 U.S. at 576-77, the Court announced the rule that creation of an Indian reservation implicitly guarantees for tribal use that amount of previously unappropriated water needed to fulfill the purposes of the reservation. In *Arizona I*, the Court reaffirmed the *Winters* Doctrine, holding that these reserved water rights, "effective" when an Indian reservation is established, are quantified to an extent necessary "to satisfy the future as well as the present needs" of the reservation. 373 U.S. at 600: *Arizona I* also adopted the PIA standard as "the only feasible and fair way by which reserved water for the [agricultural purposes of] reservations can be measured." *Id.*, at 601.

tion of the signatory Indians from nomadic to agrarian pursuits was just one key component of the permanent homelands purpose for creation of the Wind River and Fort Hall Reservations. These cases fairly establish that PIA is a proper measure of the irrigation water entitlements for these tribal homelands. The history of the Second Bridger Treaty and of the Fort Hall Reservation also underscores that irrigation of all practically irrigable acreage on those Treaty reservations is consistent with the original congressional and tribal understandings of the Treaty commitments and consonant with long-settled tribal expectations.

A. The PIA Standard Is Fully Consistent With Numerous Judicial Decisions Confirming That Gradual Adoption of Agrarian Pursuits By the Signatory Indians Was a Key Purpose For Creation of the Wind River and Fort Hall Reservations.

In *United States v. Shoshone Tribe*, 304 U.S. 111, 118 (1938), this Court, based upon an examination of the terms of the Second Bridger Treaty, concluded that such language "plainly evidence[d] [a] purpose on the part of the United States to help to create an independent permanent farming community upon the [Wind River] reservation."[2]

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[2]The Court noted that a "purpose of the [1868] [T]reaty was that the Shoshones should have, and permanently dwell in, the [Reservation] defined" by Article 2 of the Second Bridger Treaty. *Id.* at 116. In so holding, the Court construed the pertinent Article 2 phrase—securing the Wind River Reservation for the "absolute and undisturbed use and occupation" of the Shoshones—in light of the "settled policy of the United States fairly to deal with Indian tribes." *Id.* The Court specifically held that the Treaty reserved to the Shoshones and Arapahos all minerals and timber within the original Wind River Reservation boundaries despite the absence of any explicit Treaty language to that effect.

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In *State v. Tinno*, 94 Idaho 759, 497 P.2d 1386 (1972) (*Tinno*), the Idaho Supreme Court unanimously reaffirmed the continuing validity of off-Reservation anadromous fishing rights reserved by the Shoshone-Bannock Tribes in Article 4 of the Second Bridger Treaty.[3] The court

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In *Swim v. Bergland*, 696 F.2d 712, 715-716 (9th Cir. 1983) (*Swim*), the court, relying upon both *Winters* and *United States v. Shoshone Tribe, supra*, concluded that the same Article 2 of the 1868 Treaty reserved to the Shoshone-Bannock Tribes exclusive grazing rights within the original Fort Hall Indian Reservation despite the silence of the 1868 Treaty concerning such rights. The Ninth Circuit in *Swim* affirmed the trial court's finding that "the parties to the [1868] Treaty agreed and understood that the purpose of the Reservation was to enable the Tribes to transform themselves from a nomadic to an agrarian society and that grazing rights were essential to help effectuate this transformation." *Id.* at 716. *Swim* relied in this respect upon a comparable conclusion in *Skeem v. United States*, 273 F. 93, 95 (9th Cir. 1921) (*Skeem*). *Swim* further concluded that the "objective of self-sufficiency [for the tribal signatories was] implicit in the 1868 Treaty . . . ." *Id.* at 719.

The decision in *Skeem* foreshadowed the yet-to-be announced PIA standard of *Arizona I*. Relying upon *Winters* and *United States v. Winans*, 198 U.S. 371, 380-381 (1905), for the proposition that the Second Bridger Treaty reserved the Shoshone-Bannock Tribes' pre-existing rights to the Reservation, the Ninth Circuit in *Skeem* declared:

> The purpose of the government was to induce the Indians to relinquish their nomadic habits and to till the soil, and the treaties should be construed in the light of that purpose *and such meaning should be given them as will enable the Indians to cultivate eventually the whole of their lands so reserved to their use.*

273 F. at 95 (emphasis supplied).

[3]Article 4 of the 1868 Treaty stipulated that although the signatory tribes would make the Article 2 reservations "their permanent home[s]," such tribes would retain the continuing "right to hunt on the unoccupied lands of the United States [outside of those reservations] so long as game may be found thereon, and so long as peace subsists among the whites and the Indians on the borders of the hunting districts." 15 Stat. 674. In holding that the "right to hunt" under this provision

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described the dual purposes underlying that Treaty as follows:

> The gathering of food from open lands and streams constituted both the means of economic subsistence and the foundation of a native culture. Reservation of the right to gather food in this fashion protected the *Indians' right to maintain essential elements of their way of life, as a complement to the life defined by the permanent homes, allotted farmlands, compulsory education, technical assistance and pecuniary rewards offered in the Treaty.* • • • *[T]he mere passage of time has not eroded the rights guaranteed by a solemn treaty that both sides pledged on their honor to uphold.*[4]

B. The PIA Standard Is Fully Consonant With the History of the Second Bridger Treaty and of the Fort Hall Reservation.

This Court's analysis in *Arizona I* and in *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979) (*Fishing Vessel*), firmly establishes that contemporary resolution of Indian treaty claims to scarce natural resources must be grounded in a careful examination of relevant history. In light of that approach and the grave significance of this case to the Tribes, we

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embraced the continuing right to fish off-Reservation for subsistence and ancestral purposes, *Tinno* rejected as "entirely discredited" the ruling in *Ward v. Race Horse*, 163 U.S. 504 (1896), that admission of Wyoming to statehood in 1890 had repealed implicitly the Article 4 right of the Shoshone-Bannocks to hunt upon unoccupied federal land within that state, 94 Idaho at 765 n.6, 497 P.2d at 1392 n.6, including open lands within the Big Horn Basin.

[4] 94 Idaho at 766, 497 P.2d at 1393 (emphasis added). Several judicial decisions have construed the *Winters* Doctrine to embrace necessary water to preserve fish and wildlife resources on reservations and in formerly relinquished lands. *See e.g., United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1262 (1984); *Confederated Colville Tribes v. Walton*, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

overview here some pertinent history of the Second Bridger Treaty and of the Fort Hall Reservation.

The Second Bridger Treaty was one of a series negotiated in 1867-68 by a federal commission (hereinafter "Peace Commission") established by the Act of July 20, 1867, 15 Stat. 17. Section 1 of this legislation empowered the Peace Commission, composed of eminent civilian and military leaders, to negotiate with then hostile Indian tribes in order to:

> . . . ascertain the alleged reasons for their acts of hostility, and . . . to make and conclude . . . such treaty stipulations, subject to the action of the Senate, as may remove all just cause of complaint on their part, and at the same time establish security for person and property along the lines of railroad now being constructed to the Pacific and other thoroughfares of travel to the western Territories, and such as will most likely insure civilization for the Indians and peace and safety for the whites.

Id. Section 2 of this enabling legislation directed the Peace Commission to locate areas of

> *sufficient tillable or grazing land to enable the* [*various tribes*] . . . *to support themselves by agricultural and pastoral pursuits.* Said district or districts, when so selected . . . and approved by Congress, *shall be and remain permanent homes for said Indians to be located thereon,* and no person[s] not members of said tribes shall ever be permitted to enter thereon without the permission of the tribes interested, except officers and employees of the United States . . . .

Id. (emphasis added).

Senator Henderson of Missouri, the Chairman of the Senate Committee on Indian Affairs and a designated member of the Peace Commission, introduced the bill (S. 136) leading to the 1867 Act on July 15, 1867. Cong. Globe, 40th Cong., 1st Sess. 655, col. 3. The following day he de-

scribed to the Senate the exigencies necessitating the legislation:

> It is known to us that an Indian war is now being waged. Hostilities are of daily occurrence upon the Plains. * * *
>
> Now we are attempting to construct across the Plains two railroads. With these facts before us it is useless to pretend that these railroads can be constructed. General Sherman . . . says that fifty of these Indians can checkmate three thousand of our soldiers. It is unnecessary for me to go into the history of this Indian war—I have the notes of it before me—because there are but two tribes of any great extent that are engaged in hostilities against the United States: I mean the Sioux or Dakota Indians . . . and the Cheyennes and Arapahoes united together.
>
> * * * . We know the fact that unless these hostilities are suppressed, and suddenly suppressed, a very large expenditure will be forced upon us. Our Treasury is in no condition to meet it. We need to husband our resources, and if we can make peace with the Indians we had better do it.

Id. at 667, col. 3 (July 16, 1867). Urging that the government "stand . . . up to our own treaty obligations," he argued that any other course "will only inflict dishonor upon ourselves and accumulate our public debt." *Id.* at 669, col. 2.[5]

The ensuing Senate debates from July 16-18, 1867 expanded into a wide-ranging discussion of overall federal policy regarding Indians. There was no disagreement that war against a few hostile tribes would prove far too

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[5]Laying out considerable historical detail, Senator Henderson then proceeded to explain exactly why the Sioux and Cheyenne-Arapahoe had engaged in hostilities: the United States government had violated existing treaty commitments to

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costly to the national government.[6] Nor was there any real dispute that the United States had violated treaty commitments in numerous instances throughout American history.[7] Concensus also existed on the need to locate the warring tribes and all roaming Indians upon reservations removed from rail and wagon lines to the West.[8]

The Senate clearly understood, however, that those tribes which had lived forever solely by hunting, fishing, and gathering would have to continue those pursuits and would be transformed to an agrarian lifestyle only with great difficulty and care. Senator Harlan of Iowa, a former Secretary of the Interior, expressed this understanding which underlies the treaties, including the Second Bridger Treaty, subsequently concluded by the Peace Commission:

> * * * . There are the Crows and the Blackfeet, who have inhabited this region of country for centures, and who are as much attached to the soil, doubtless, as the white people are attached to their homes, and they would be as difficult to remove [to the Oklahoma Territory] as the people of Switzerland would be from the hills on which they have resided for centuries.

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these Indians by allowing construction of wagon roads and forts over territory acknowledged as theirs without their consent and without compensation to them. *Id.* at 668-69 (July 16, 1867).

[6]Cong. Globe, 40th Cong., 1st Sess. 680, col. 3 (July 17, 1867) (Remarks of Senator Sherman); *Id.* at 681, col. 1 (same); *Id.* at 708, col. 1 (July 18, 1867) (Remarks of Senator Morrill); *Id.* at 708, col. 3 (Remarks of Senator Pomeroy).

[7]Cong. Globe, 40th Cong., 1st Sess. 680, col. 1 (July 17, 1867) (Remarks of Senator Sherman); *Id.* at 681, col. 3 (Remarks of Senator Howe); *Id.* at 683, col. 2 (Remarks of Senator Howard).

[8]Cong. Globe, 40th Cong., 1st Sess. 670, col. 3 (July 16, 1967) (Remarks of Senator Henderson); *Id.* at 679, col. 2 (July 17, 1867) (Remarks of Senator Sherman); *Id.* at 681, col. 2 (Remarks of Senator Pomeroy); *Id.* at 682, col. 1 (Remarks of Senator Howe).

> * * * . We must look at these things practically. Theoretically, it might be very well to send them all down south . . .; but we know practically, I suppose, everybody who has looked into the subject closely knows, that the northern Indians cannot be induced to go down there. They have lived on the buffalo, the elk, the antelope, the deer, the vegetable products of that country, and the fish of the streams for century after century, and they are as much attached to their homes as we to ours.[9]

The Peace Commission, acting pursuant to the 1867 Act, negotiated the Second Bridger Treaty with tribal leaders Washakie and Tahgee. Washakie was well respected in Congress and throughout the West as:

> . . . such a man that if we had more like him, whether among the pale faces or Indians, we should have but very little trouble and be better off upon the frontier.[10]

Tribal signatories to the Second Treaty of Fort Bridger were composed of several groups identified anthropolo-

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[9]Cong. Globe, 40th Cong., 1st Sess. 678, col. 2 (July 17, 1867); *Id.* at 713, col. 1 (July 18, 1867). These views were echoed by Senator Henderson who also emphasized that continuation of traditional tribal pursuits could eliminate the necessity of governmental aid to the Indians. *Id.* at 703, col. 1. Senator Henderson likewise expressed the commonly held view in the Senate that all treaties previously made by the United States with Indian tribes operated to recognize the Indians' pre-existing rights as the original inhabitants of the continent. *Id.* at 668-669 (July 16, 1867).

[10]Cong. Globe, 40th Cong., 3d Sess. 803, col. 1 (February 2, 1869) (Remarks of Representative Hooper of Utah Territory). Of Washakie's tenure as a Shoshone leader for decades before and after 1868, Justice Cardozo, speaking for the Court, stated in *Shoshone Tribe v. United States*, 299 U.S. 476, 486 (1937):

> The loyalty of the Shoshone Tribe to the people of the United States has been conspicuous and unfaltering. A fidelity at least as constant and inflexible was owing in return.

gically as "Northern Shoshone" and "Bannocks."[11] In that Treaty, 15 Stat. at 677, the federal negotiator, General C.C. Augur of the Peace Commission, designated these tribal entities as the "eastern Band of Shoshonees" (led by Chief "Wash-a-kie") and the "Bannock Tribe" (led by Chief "Tag-gee"). In fact, however, the entities thus aggregated were not merely two, unrelated tribal groups. In *Tinno* the Idaho Supreme Court, based on expert anthropological and linguistic evidence, found:

> . . . the Indians represented at the Fort Bridger negotiations were a rather diverse group in terms of geography and social or political allegiance. • • • [T]he various tribes or bands were in fact rather loosely knit units, and individual families freely changed their associations from one group to another; so called Shoshone Indians could and did join and live with Bannock bands and did intermarry. The two languages [Shoshone and Bannock] though different, were not substantial hurdles to social mixing.[12]

During the pre-1868 period, the Tribes considered the current location of the Fort Hall Reservation along the Snake River as their home, spending several months of

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[11]Brigham D. Madsen, *The Northern Shoshoni* 17-26 (Caxton Printers, Caldwell, Idaho, 1980) (hereinafter *"The Northern Shoshoni"*).

[12]94 Idaho at 762-63, 497 P. 2d at 1389-90. From ancestral times, the Shoshone-Bannock Tribes, including current descendants of Tahgee's Bannock Tribe, have always used an extensive aboriginal domain for migratory hunting, fishing and gathering pursuits. In *Tinno*, 94 Idaho at 764, 497 P. 2d at 1391, the Idaho Supreme Court, relying again upon expert anthropological evidence, found that the Shoshone-Bannock before 1868 ranged over "vast areas of Idaho and surrounding States," including "the Salmon River country, the Snake River country, and the length of what is now Southern Idaho". See also *State v. Cutler*, 109 Idaho 448, 461, 708 P. 2d 853, 866 (1985) (dissenting opinion) (Tribal aboriginal territory included major portions of Idaho and all surrounding states); 11 Ind. Cl. Comm. 387, 404-405 (1962); *The Northern Shoshoni*, 17-26.

each annual migration in that locale.[13] Scholarly research confirms Shoshone-Bannock utilization of the Fort Hall Reservation region since time immemorial.[14]

As found in *Swim*, 696 F.2d at 714, "[a]lthough the [1868] Treaty called for a Reservation of 1.8 million acres, 'surveying errors' in 1873 reduced its actual size to approximately 1.2 million acres." Between 1880 and 1900, the Tribes entered into cession agreements with the United States, whereby the original Fort Hall Reservation was yet further reduced to about 534,000 acres. *Id.*[15]

II. THE SNAKE RIVER NEGOTIATIONS DEMONSTRATE THE PIA STANDARD IS THE MOST RELIABLE AND EQUITABLE MEANS FOR RESOLVING INDIANS' RESERVED WATER RIGHTS CLAIMS FOR AGRICULTURAL PURPOSES.

Since 1985 the Shoshone-Bannock Tribes, the State of Idaho, private Idaho water users, and the United States

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[13]See *Shoshone Tribe v. United States, supra,* 11 Ind. Cl. Comm. at 404 (finding that before 1868 "Shoshone and Bannock Bands . . . preferred the country along the Snake River and its tributaries in southeastern Idaho" as their "home-base or area of greater attachment").

[14]Recent archaeological research by scholars working at Idaho State University near Fort Hall confirms Shoshone and Bannock utilization of the Reservation area for at least 2,000 years, and probably ranging deeper than 12,000 years into the immemorial past. See also *The Northern Shoshoni* at 17 (Introduction by Dr. M. Wells, Idaho State Historical Society) ("People have lived in the Salmon River mountains and the Snake River Plains—the traditional homeland of the Northern Shoshoni—for the past fourteen thousand years or more").

[15]The current Fort Hall Reservation contains 543,932 acres which is owned primarily by the Tribes collectively (47 percent) and by individual Indians holding allotments subject to restraints on alienation without the consent of the United States (43 percent). The United States holds title to about six percent of Reservation lands, most of which (more than 28,000 acres) were ceded to the United States in 1924 to assure construction of the American Falls Reservoir. See Act of May 9, 1924, 43 Stat. 117. Non-Indians own about four percent of current Reservation lands.

have been engaged in negotiations to quantify the Tribes' federally reserved water rights in the Snake River Basin in Idaho (hereinafter sometimes "Snake River Negotiations"). These historic, good-faith efforts are designed to finally and fairly determine the amount of water to which the Shoshone-Bannocks are entitled to satistfy agricultural purposes underlying creation of the Fort Hall Reservation. In seeking to fulfill the nineteenth century Treaty promises of water for this agrarian purpose, the negotiating parties in Idaho are relying substantially on PIA as foreshadowed in *Winters* and explicitly adopted in *Arizona I*.[16]

A. Use of PIA Has Enabled the Shishone-Bannock Tribes, Supported by the United States, to Engage in an Open, Good-faith, Negotiation Process With the State of Idaho and Non-Indian Water Users To Address Common Interests and Resolve Conflicts Over the Waters of the Snake River.

Following nearly four years of intensive, amiable good-faith negotiations with the State of Idaho, the Shoshone-Bannocks are dismayed by Idaho's arguments before this Court as *amicus curiae*, characterizing these negotiations founded on the use of PIA as "producing unreliable results." *Brief of Amici States*, 16. Idaho portrays PIA as a "divisive" standard which "continues to frustrate negotiations." *Id.* at 17. Idaho and other *amici*

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[16]The Snake River Negotiations have been premised since inception upon the continued viability of PIA. Any modification or abandonment of that well-settled doctrinal principle will definitely sabotage these negotiations, lead to protracted and divisive litigation, undermine the integrity of 1886 Treaty commitments made by the Tribes and the United States, and authorize state courts to engage in wide-ranging "balancing" of Indian and non-Indian water needs. Clearly, decision in this case is of the utmost importance to the Shoshone-Bannock Tribes and all Indian tribes in the western United States.

states' half-hearted attempt to disparage PIA, in light of the Snake River Negotiations, appears to be advanced purely for litigious and political reasons.[17] The Shoshone-Bannock Tribes adamantly disagree with Idaho's characterization of these negotiations.[18]

Federally reserved water rights—specifically, the Shoshone-Bannock Tribes' water rights—were targeted for inclusion in an Idaho state court general stream adjudication of the Snake River as early as 1984.[19] The Tribes, cognizant of the divisive and costly nature of litigation, proposed to the Legislature that the State of Idaho join the Tribes in good-faith, government-to-government negotiations to define and quantify the nature and extent of the Tribes' federally reserved water rights under the *Winters* Doctrine in the Snake River Basin in Idaho.

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[17]If equipped with this new arsenal of subjective "tailoring" measures, Idaho would be free to renegotiate—virtually dictate—the terms of a recently proposed water rights settlement with the Tribes. Such an outcome was not bargained for —more than four years ago—by the respective parties when the process of negotiations was debated and subsequently elected as the preferred process for determining the measure of the Tribes' water rights.

[18]In *Arizona v. San Carlos Tribe*, 463 U.S. 545 (1983) (*San Carlos*), a majority of the Court held that state courts could exercise concurrent jurisdiction to adjudicate Indians' water rights reserved under federal law. As early as January 1985, just eighteen months following *San Carlos*, the 48th Idaho Legislature was moving to initiate a massive general stream adjudication of the Snake River Basin in Idaho, and thereby raise an estimated $27 million to underwrite such litigation.

[19]On October 7, 1984, Idaho's Governor Evans called for legislation authorizing a general stream adjudication of the Snake River and served notice that "Shoshone-Bannock tribal water rights, as well as the Idaho National Engineering Laboratory's federal water reserve, will be included in the adjudication process." B. Bugger, "Evans: Benefits of Agreement Will Outweigh Costs," *Idaho State Journal* (Pocatello, Idaho: October 7, 1984), 2.

In ensuing legislative hearings following the Tribes' initiative, considerable discussion occurred, centered around the relative merits of litigation as opposed to negotiation of the Tribes' water rights.[20] The Tribes suggested that Idaho and its Indian citizens could learn from the mistakes of other states and tribes. The Tribes insisted satisfaction of the Shoshone-Bannocks' reserved water rights through a negotiated process could lead to an agreement which would benefit both Indians and non-Indians.

To its credit, the 48th Idaho Legislature, joined by the Governor, Attorney General, irrigators, and the principal investor-owned utility, responded with virtual unanimity in supporting a two-year delay of the adjudication in favor of attempting a negotiated settlement. H. Con. Res. 16, 48th Idaho Leg., 1st Sess. (1985). By resolution dated July 17, 1985, the Fort Hall Business Council, the duly-recognized tribal governing body, requested that the United States, consistent with federal trust responsibilities to the Tribes, assist and participate in the Snake River Negotiations.[21]

Assuring the participation of private Idaho water users in the Snake River Negotiations was of concern to

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[20]The experience of Wyoming and the respondent tribes in the Big Horn River adjudication was cited as the classic example of the divisive and costly result of an all-out attempt by a state to limit or eliminate Indians' water rights. Specifically referring to the Big Horn River litigation as the "Great Wyoming Shoot-out" with the only winners the "hired guns," Special Master and former Congressman Teno Roncalio admonished the parties in Idaho to negotiate a mutually beneficial agreement rather than litigate. Snake River Negotiations, Address of T. Roncalio, February 28, 1986 at Hall of Mirrors in Boise, Idaho.

[21]On August 30, 1985, by a Memorandum of Understanding, the Tribes, the State, and the United States agreed to commence good faith, government-to-government negotiations as

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the governmental parties from the outset. Executive Order No. 85-9, issued by then-Governor Evans, instructed the Chairman of the Idaho Water Resource Board to represent Idaho in the negotiations, and, further, to provide for the effective involvement of interested Idaho water users and ther members of the public therein.[22]

In the spring of 1986, the Tribes, State, and water users jointly drafted comprehensive revisions to the Idaho water adjudication statute, which provided, *inter alia*, for a general stream adjudication and allowed for a negotiated settlement of the Tribes' *Winters* Doctrine claims, as well as all other federal water claims in Idaho, to be submitted to the state court in lieu of litigation claims. The negotiations proceeded with the Tribes, State of Idaho, United States, and interested water users all seated equally at the four-place table, committed to good-faith negotiations, with decisionmaking based on sharing of the best information available.

Utilizing the *Arizona I* framework, PIA was endorsed by all parties from the outset as a settled and accepted

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early as October 15, 1985. On January 10, 1986, the Tribes, the State and the United States agreed to extend that August 30, 1985 Memorandum of Understanding. The parties subsequently made a Technical Studies Agreement establishing a methodology to review the Tribes' reserved water rights claims and to identify matters for further discussion and analyses.

[22]On October 31, 1985, the Chairman of the Idaho Water Resource Board, joined by the Tribes and the United States, appointed an Ad Hoc Committee to recommend how best to provide for the effective involvement of interested Idaho water users and other members of the public in the negotiations. That committee submitted its recommendation for review by the Idaho Water Resource Board on December 6, 1985 and for action by negotiators on December 10, 1985. Thereafter, interested water users were provided access to the Snake River Negotiations on equal footing with the Tribes, the State of Idaho, and the United States.

standard to be employed in measuring the Tribes' water right for agricultural purposes.[23] Through four years of negotiation, PIA was never questioned as the appropriate basis for determining the tribal agricultural water rights. From the very inception of the Snake River Negotiations, the approach was, first, to determine the Tribes' water entitlements under the *Winters* Doctrine, and, second, to satisfy those tribal rights in a manner that minimized adverse impacts on present, non-Indian water uses permitted under state law.

Thus, in the Snake River Negotiations, PIA provided a settled and equitable foundation for an open, workable approach to measurement and satisfaction of the Tribes' current and future needs based on the best available evidence. The structure, certainty and focus provided by the PIA standard settled since *Arizona I* brought all parties—Indians and non-Indians—to the bargaining table as equals, intent upon fashioning a mutually-beneficial agreement that was consistent with the congressional and tribal intentions underlying the Treaty and subsequent tribal and federal agreements.

The negotiations provided an opportunity for the Tribes to measure by an objective and fair standard their entitlement to a reserved water right. The State and water users were given the opportunity to fashion a water agreement that devoted much time and analysis to devising a solution which would minimize impacts on non-Indian water users. The proof of the productivity of this nego-

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[23]The Tribes hired an agricultural engineer, Woldezion Mesghinna of Stetson Engineers, also the expert for respondent tribes in this case, to prepare the Shoshone-Bannock Tribes' claims to water for agricultural purposes as implicated by PIA. The Idaho water users retained Craig Sommers of ERO Engineering, the State of Wyoming's principal expert in this case, to evaluate and scrutinize the Tribes' agricultural claims in the Snake River Negotiations.

tiated effort, structured around PIA, lies in the fact the parties are close to concluding an agreement.[24]

B. These Snake River Negotiations Have Entailed Reliable, Reasonable, and Cost-Effective Technical Analyses To Measure the Tribes' Water Rights, In Part, by the PIA Standard.

The settled principles established by *Arizona I* served as a foundation for the water claims advanced by the Tribes for agricultural purposes. Using PIA, those tribal claims were based on the number of acres within the Fort Hall Reservation land base susceptible to sustained irrigation at reasonable cost.[25] The Tribes' claims were then subjected to searching and detailed scrutiny by the Idaho Department of Water Resources, its expert consultant engineering firm, Idaho water user groups and their engineering experts, as well as soil scientists from the United States Department of Interior through the Bureau of Indian Affairs and the Bureau of Reclamation. Yet Idaho claims that PIA proved "unreliable because small changes in certain parameters" implicit in the standard "created dramatic changes in the Tribes' irrigible acreage." *Brief of Amici States* at 16. Idaho suggests that because disagreement surfaced over underlying parameters, PIA proved "divisive." *Id.*

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[24]Indeed, the most divisive and unsettling factor in the negotiations has been the grant of *certiorari* by this Court. Arguments advanced by Wyoming and the *amici* states fairly imply a potential for further limiting tribes' reserved water rights beyond limits already imposed by the PIA standard. Wyoming and the *amici* states anticipate that this Court may sanction unbridled discretion by state courts, thereby positioning the states to effect a substantial reduction of tribal water entitlements.

[25]In an agreement saving taxpayers hundreds of thousands of dollars, the parties initially agreed that no further studies of soils were necessary. As a result, the Tribes' claims were based on existing soil studies by the United States Soil Conservation Service and United States Bureau of Reclamation.

Idaho and the *amici* states characterize tribal proposals as "abstract" irrigation projects that will "never be developed." *Id.* at 10. Idaho cities the proposed Fort Hall projects requiring a transmountain diversion as their exemplum of such Indian irrigation projects. *Id.* at 16. However, these so-called abstract, never-to-be-developed projects were actually proposed by the United States government in the design of future tribal irrigation systems long before the Tribes initiated good-faith negotiations. That design was subsequently adopted by Tribal engineering experts due to its economic feasibility.

Idaho states these expensive projects could only be justified by factoring in the production of specialty crops, i.e., carrots, and by "attaining yields on other crops exceeding yields currently obtained by non-Indian farmers in the same area." *Id.* at 17. The alleged "excessive yields" projected by the Tribes' experts for crops such as alfalfa are, in fact, already attained and sometimes exceeded by adept non-Indian corporate farmers in the area.[26]

Idaho further suggests that agreement could not be reached on cropping patterns. But that was because neither tribal nor federal negotiators could accept a crop rotation scheme recommended by the State. The State's proposed crop rotations consumed little water and provided only marginal economic returns thereby reducing the benefit/cost ratios for the tribal projects and, as a result, drastically reducing the tribes' water entitlement as

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[26]Carrots—also grown by non-Indians in the area—were included as part of the overall crop rotation. Once Reservation lands are determined susceptible to sustained irrigation, whether carrots are, or are not, included in the crop rotation is irrelevant.

measured by the PIA standard.[27] Idaho states there was not final agreement on the amount of arable lands within the Fort Hall Reservation. However, the difference between the parties was *de minimis*.[28]

Negotiations naturally embrace disagreements over a variety of factors underlying any measurement of tribes' reserved water rights. Using PIA, the Snake River Negotiations required and allowed parties to refine such differences. The original intention of negotiators, i.e., determining the Tribes' entitlement to water and satisfying such an entitlement with sensitivity to non-Indian water uses, has remained intact. So too have the Tribes' claims to water rights reserved under *Winters*, measured in part by PIA.[29]

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[27]Idaho also sought to impose usurious "discount rates" in evaluating the costs and benefits of future development of the Tribes' irrigation systems, twice the rate of time preference accepted and applied by the Wyoming Supreme Court. Such inflated discount rates would require that Indians, in developing their water resources, have an extremely short time horizon, i.e., that they heavily discount future returns. See T. Koopmans, "Proof for a Case where Discounting Advances the Doomsday," *Review of Economic Studies* (Symposium on the Economics of Exhaustible Resources, 1974) 117-120.

[28]None of Idaho's arguments, when viewed in their proper context, justify the characterization of the PIA standard as "divisive" or the tribal projects as "fantasies." A comparison of the exacting scrutiny imposed on Indians' water projects through the PIA standard against that of the largess associated with other western water projects—*inter alia* the Central Valley Project, the Central Arizona Project, and the Central Utah Project—demonstrates that the real fantasy lies in the feasibility standards for non-Indian projects, not PIA. See e.g., M. Reisner, *Cadillac Desert* (New York: Viking Penquin Inc., 1986) 151-75.

[29]The parties to the Snake River Negotiations are in the process of exchanging a fourth draft agreement, and this very day, the Tribes' submitted a draft agreement to Idaho water users for their consideration. The "balance" at the negotiating table will severly tip to the state's favor if armed by this Court with "tailoring" or "minimum needs" tests. Such onerous and

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III. MODIFICATION OR ABANDONMENT OF THE PIA STANDARD IN FAVOR OF AMORPHOUS BALANCING TESTS WILL ESCALATE UNCERTAINTY, CREATE EXTREME FRICTION, AND REQUIRE PROTRACTED LITIGATION.

The thrust of the positions of Wyoming and the *amici* states is that Indian signatories to the treaties, in exchange for surrender of the right to occupy millions of acres of pristine land—and ways of life enjoyed unfettered from non-Indians' encroachment since time immemorial—, received in return nothing more than an opportunity to achieve the barest minimum standard of living to be derived from the natural resources of their homelands.

A. The "Tailored" Tests Which Wyoming and the Amici States Urge This Court To Adopt Necessarily Embrace Minimal-Existence Theorems Thoroughly Discredited By Economists.

Wyoming and the *amici* states urge this Court, upon remand, to instruct the Wyoming courts to administer a hodgepodge of tests so as to assure: (1) that those water rights retained in tribal ownership are just sufficient to avoid entirely defeating the tribal/congressional purposes underlying the creation of permanent tribal homelands; (2) that Indians receive no "windfalls" in any state court adjudication; and (3) that no additional water is made available for tribal use absent a "demonstrated need", or if "ample opportunity" to participate in federal water resource development projects has already been afforded per chance to tribes.[30]

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invidious standards leave tribes with no option but litigation in a protracted attempt to prevent the usurpation of their water rights.

[30]Further, borrowing a phrase from *Fishing Vessel*, a case which implicated only fishing rights jointly held in common and

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1. This Court Has Repeatedly Rejected the Tests Proposed By The States.

This is not the first invitation urged upon this Court to sanction a balancing test for determining the scope of reserved rights. In other previous cases before this Court, such arguments were flatly rejected.[31] This Court and others have long recognized that an open-ended balancing test is wholly inappropriate in the context of Indian water rights litigation. This Court should continue to reject out of hand any specious balancing test.

2. Economists, Following Centuries of Debate, Discarded Minimal Existence Theorems Because of Their Untenable Assumptions and Subjectivity

Assuming *arguendo* that the states' selective appeal to the diverse case precedents accurately reflects upon the

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affirmed by and for both Indians and non-Indians, the states request this Court's permission to empower their elected jurists to confine Indians to a "moderate" standard of living and "narrowly tailor" the scope of any Indian water rights settlement, so as to provide "sensitivity" to the recently settled expectations of non-Indian water users acting pursuant to state laws.

[31]In *Winters*, the Court determined that Indian water rights were paramount to subsequent non-Indian state water appropriations. In *Winters*, the non-Indians contended that "if the claim of the United States and the Indians be maintained, the lands of the defendants and the other settlers be rendered valueless, the said communities will be broken up and the purpose and object of the government in opening said lands for settlement will be wholly defeated." 207 U.S. at 570. The Court understood the conflict between Indians and non-Indians' claims, but recognized "that which makes for the retention of the waters [by the Indians] is of greater force than that which makes for their cession." *Id.* at 576. Thus the Fort Belknap Agreement of 1888 creating the reservation was of "greater force" than the investments subsequently made by the settlers.

The Court of Appeals of the Ninth Circuit has consistently followed the lead of this Court. Commenting on *Winters*, the

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Court's past judgment, there remains the issue of whether it would even be possible for state courts to carry out such tests in any objective, supportable manner. Apparently, the states are unaware of a debate which occurred in economics over roughly two centuries beginning in the mid 1600's.

The extended debate sought to establish an objective standard for determining the "minimal needs" of the class of people who furnished their labor power in the production of commodities. Economists finally agreed that any theoretical underpinning lending support to a minimum-of-existence theory of wages necessarily rested upon an untenable and uncritical acceptance of T. Malthus' "Law of Population," i.e., that exponential population growth outstripped finite resources and bid wages down to a subsistence level—or below.[32] If this Court breaks faith with

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Ninth Circuit noted that "the Indians were awarded paramount rights regardless of the quantity remaining for the use of white settlers." *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 327 (9th Cir. 1956) *cert. denied*, 352 U.S. 988 (1957). The Court further stated,

> What the non-Indian appropriators may have is only the excess over and above the amounts reserved for the Indians. It is plain that if the amount awarded the United States for the benefit of the Indians in the *Winters* case equalled the entire flow of the Milk River, the decree would have been no different.

Id.

[32]T. Malthus, *Essay on the Principle of Population* (1798). Since virtually all economists agreed that an uncritical acceptance of this Malthusian Principle was untenable, the search for an objective way to determine the subsistence needs of labor was abandoned and the minimum-of-existence theory was discredited as resting wholly on social commentary.

> [M]ost of these utterances were preanalytic in nature. They reveal sentiments and evaluations that reflect important aspects of social history and are a legitimate object for the

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the solemn promises inherent in treaties and allows states' elected jurists to recast longstanding principles for determining the extent of Indian water rights over into some specious battery of "minimal" Indian existence tests, such tests will, of necessity, be based upon thoroughly discredited and insupportable economic theorems.

3. Tests Based on Minimal-Existence Theorems Will Be Administered With Aggressive Severity

In the absence of any objective standard, state court administration of any "minimal" or "moderate" needs tests could easily be contaminated by unbridled discretion and might inevitably result in the virtual dismantling of Indians' water rights. Wyoming in particular urges this Court to discard the PIA standard, alleging that its use as a measure of tribes' agricultural water rights effectively creates "windfalls" for tribes (Wyo. Brief 28)[33] which

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> application of Marxist theory of ideology . . . . [H]owever, these sentiments mean only an additional difficulty of interpretation: we are driven to unraveling elements of analysis from the various recommendations of our authors—or such reasons as they give for their normative statements—and in doing so we are in *constant danger of mistaking for an analytic proposition what may have been no more than a profession of sympathies.*

J. Schumpeter, *History of Economic Analysis* (New York: University Press, 1954), 266-67 (emphasis added).

[33]Windfalls are viewed by economists as changes in the value of traders' portfolios brought about by unexpected variations in prices, interest rates, and income. See J.M. Keynes, *The General Theory of Employment, Interest and Money* (New York: Harcourt Brace and World, Inc., 1964) 135-244; B. Pesek, et al., *Money, Wealth and Economic Theory* (New York: Macmillan, 1967) 3-38; D. Patinkin, "Money and Wealth: A Review Article," *Journal of Economic Literature*, Vol. 7 (December 1969) 1140-60; K. Arrow, "The Future and Present in Economic Life," *Economic Inquiry*, Vol. XVI, No. 2 (1978), 157-169; and A. Lei-

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will vanquish "industry and thrift" from Indians' "habits." *Id.* at 19, n.25, (interpreting the position of the United States in *Gila River Pima-Maricopa Indian Community v. United States*).[34]

Wyoming's argument exhibits striking similarities to an "attitude of aggressive severity" espoused by economists as early as 1664 in order to justify an untenable "utility of poverty" doctrine.[35] Under the guise of discouraging sloth and indolence, the poverty doctrine held that laborers, as a class, must—in the national interest—be subjected to low wages and high commodity prices sufficient to bind them in a perpetual state of poverty. This popular proposition was simply a variant of the minimal-

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jonhufvud, *On Keynesian Economics and the Economics of Keynes*. (New York: Oxford University Press, 1968) 187-385. Satisfaction of tribal reserved water rights merely confirms the value of tribal water resources and creates no such windfalls.

[34]Indian people are among the most impoverished in American society. Based on Bureau of Census figures for 1980, for all persons on the Fort Hall Reservation, only sixty-six percent live above the poverty line. It is clear that poverty falls disproportionately upon the Indian segment of the Reservation population. Forty-six percent of the Indian households on the Reservation live below the poverty line whereas only seventeen percent of non-Indian households live in poverty at Fort Hall. Similar imbalances are evident in Reservation employment patterns. In 1980, Indian people accounted for fifty-three percent of the Reservation population but comprised seventy-eight percent of people experiencing unemployment. In light of the disparaging differences between Indian and non-Indian employment at Fort Hall, and nationwide, coupled with an alarming number of impoverished Indian households subsisting at Fort Hall and on other reservations, Wyoming's petition, i.e., that this Court eliminate possibly all windfalls arising from a just settlement of tribal water entitlements, should give the Court—and the nation—great pause.

[35]Thomas Mun, *English Treasure* (1664), 182, cited in R. Furniss, *The Position of the Laborer in a System of Nationalism* (New York: Kelley & Millman, Inc., 1957), 117.

existence theorem which the classical economists first labored to justify and later abandoned or recanted.[36] In candid form, it was argued that extreme measures[37] were required to reduce the real wealth of the working class.[38]

B. Continued Adherence to PIA Is the Only Fair and Equitable Way to Honor Those Treaty Commitments Which Opened the West to Peaceful Settlement.

Certainty and finality are axioms adopted by this Court in its disposition of water rights cases.[39] Over the

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[36]It served a dual purpose. First, it provided a thinly-veiled justification for effecting a redistribution—from laborers to the owners of capital—of the surplus value (wealth) created in the production of commodities. Second, its uncritical acceptance led to strident advocacy for the proposition that if the impoverished and unemployed received windfalls in excess of their barest subsistence needs, such programs could only serve to defeat habits of industry and thrift amongst that social class.

[37]A combination of reduced wages, increases in commodity prices, and a diminishment of relief programs were deemed appropriate.

[38]Wyoming seeks to employ a similarly unfounded argument as a vehicle for convincing the Court to discard PIA, urging that, upon remand, the amount of Indian water rights reserved for agricultural purposes be reexamined so as to eliminate any "windfalls" which might afford that impoverished segment of the population to enjoy an improved standard of living. Such an uncritical reevaluation of Indians' subsistence needs would allow non-Indians, who have historically enjoyed the use of water reserved by and for the tribes, to effect a permanent destruction of Indians' wealth through transfer to non-Indians of the water resources vested in the tribes by the Legislative Branch and Executive Branch of the federal government.

[39]For example, in *United States v. New Mexico*, 438 U.S. 696 (1978), the Court limited the scope of federal reserved rights for the Gila National Forest by narrowly defining the purposes for which the forest was created. The Court has declined to increase the quantity of Indian rights due to previously omitted lands in *Arizona v. California*, 460 U.S. 605 (1983). Finally, in *Nevada v. United States*, 463 U.S. 110 (1983), the Court

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past 80 years, *Winters* has remained constant and viable because of this Court's adherence to the accepted doctrine of *stare decisis*. Judicial restraint has consistently assisted Indian tribes and states in the application of the PIA standard. The Shoshone-Bannock urge this Court to continue the "straight path of *stare decisis*" and not break with tradition. *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). To detour would be to "replace what is ideally a sense of guaranteed right with the uneasiness of unsecured privilege." *Patterson v. McLean Credit Union*, — U.S.—, 108 S. Ct. 1419, 1423 (1988) (Stevens, J., dissenting).

This Court first observed the states' opposition to tribal rights in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), and later stated that the "people of the States where [Indians] are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886). Similarly, Justice Stevens, dissenting in *San*

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refused to reconsider an earlier settlement of water rights even though an Indian tribe had not participated directly in the settlement agreement. PIA is a quantifying measure that has been utilized in water settlements and litigation which results in certainty and finality. Any abandonment of this standard would cause disruption with no predictable result and no end to water conflicts.

The use of PIA in quantifying Indians' reserved water rights was announced by the Court in 1963. This standard, however, was not a new measure; it developed over the years beginning in 1908 with *Winters*. See also *Conrad Investment Company v. United States*, 161 Fed. 829 (9th Cir. 1908); *Skeem v. United States*, 273 F. 93 (9th Cir. 1921); *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir.), *cert. denied*, 352 U.S. 988 (1957). Over the years, PIA proved to be a workable method and thus became a settled and acceptable, core principle, particularly useful in determining Indian tribes' future water needs. PIA is no boon for Indian tribes; rather, it provides a method for placing an upper limit, a ceiling, on water reserved for tribal agricultural endeavors.

Carlos, 463 U.S. at 575 (1983), noted that "States and their citizens may well be more antagonistic toward Indian reserved rights than other federal reserved rights, both because the former are potentially greater in quantity and because they provide few direct or indirect benefits to non-Indian residents."

Recognizing Indian tribes' apprehensions about litigation of any issue in state courts, let alone reserved water rights, this Court declared in *San Carlos:*

> [A]ny state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment.

Id. at 571.[40] If the propositions urged by the State of Wyoming and *amici* are accepted, Courts of the future will no doubt be obligated to review with "particularized and exacting scrutiny" a parade of incomprehensible lower court decisions whieh have been unable to apply any appropriate measuring device for quantifying Indians' reserved water rights.

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[40]It was in *United States v. Carolene Products Company*, 304 U.S. 144, 152-53, n.4 (1938), decided the same day as *United States v. Shoshone Tribe*, 304 U.S. 111 (1938), that Justice Stone, speaking for a majority of the Court, suggested that this Court might well in the future be required to determine "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

IV. CONCLUSION

For the reasons set forth above, this Court should affirm the determination of the Wyoming Supreme Court regarding application and use of PIA in the facts of this case. The Shoshone-Bannocks, based on our experience, posit that the success or failure of the Snake River Basin negotiations, as well as future negotiations to resolve Indian reserved water rights claims in numerous other western states, turns on resolution of the question before the Court. As stated by Justice Black, dissenting in *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99, 142 (1960): "Great Nations, like great men, should keep their word."

RESPECTFULLY SUBMITTED this 12th day of April, 1989.

Respectfully submitted,

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